UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

ERIC W. PAYNE,	)	
	)	
Plaintiff	)	
	)	**Case No. 1:10-cv00679-RWR**
v.	)	
	)	
DISTRICT OF COLUMBIA, ET AL.	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S OPPOSITION TO COLLECTIVE MOTIONS FOR PROTECTIVE ORDERS ON BEHALF OF MAYOR VINCENT C. GRAY, COUNCIL MEMBER JACK EVANS AND COUNCIL MEMBER JIM GRAHAM

COMES NOW Plaintiff, Eric W. Payne ("Payne" or "Plaintiff"), by and through undersigned counsel and respectfully opposes the collective motions of Mayor Vincent Gray, council member Jack Evans and council member Jim Graham for a Protective Order and to Quash Payne's Subpoenas for depositions in the above-captioned matter, pursuant to Federal Rule 30(b)(6). In support of his opposition, Mr. Payne presents below a brief introduction, a detailed factual background and proffer for the proposed depositions and an argument. It is instructive that Payne's facts and proffer are supported by his attached affidavit, which is incorporated by reference. See Exhibit 1.

INTRODUCTION

In July 2004, Payne was hired as Assistant General Counsel for procurement matters within the Office of the Chief Financial Officer ("OCFO"). On October 25, 2004 he received a performance evaluation from the OCFO's General Counsel, in which he received the highest rating possible – "Significantly Exceeds Expectations." In June 2005, Payne was asked to temporarily fill the position of OCFO Contracts Director, following his predecessor's abrupt

departure. Payne served in this acting capacity until May 2006. On May 11, 2006 Payne became the sixth Director of Contracts for the OCFO in ten years and served as such for more than two years. Prior to this promotion, he received an annual performance evaluation for FY 2005 of 4.538/5.0, which placed him in the top percentile of performers within the OCFO. His overall score placed him in the "5" category – "Significantly Exceeds Expectations." Along with this stellar rating came eligibility for an annual performance bonus. On December 2, 2006 Plaintiff received a performance evaluation from his new supervisor, Paul Lundquist, Office of Management and Administration's ("OMA") Executive Director. His evaluation was a 4.0/5.0 – "Exceeds Expectations." Once again, he qualified for and received an annual performance bonus. He also received a Special Act Award, progressed from an annual salary of $92,890/year in 2004 to $135,925/year in 2008 and received stellar performance ratings each year.

In January 2008, on behalf of the OCFO, Payne initiated the Online Gaming Contract award process. The previous contractor, Lottery Technology Enterprises ("LTE"), had caused increasing problems for the OCFO over the previous three years due to performance related issues, including an unprecedented security breach. After an extended, transparent and objective competitive procurement process, the OCFO determined that the new proposed contractor – W2I – offered a technologically superior offering at a markedly lower rate than LTE. W2I was a joint venture comprised of W2Tech LLC (a minority owned D.C. firm) and an international gaming company, Intralot. In accordance with applicable law, the District of Columbia ("D.C.") City Council ("Council") was required to review and approve the proposed contract award. At this juncture, these contract review processes, which had historically been pro forma, occurred under Payne's watch without incident and in a timely fashion. Any questions that arose were primarily about substantive aspects – technical or price aspects – of a proposed contract award. Council

review, hearing consideration and approval is, admittedly, protected by legislative immunity. However, certain council members' activities fell far outside of that legislative process, such as attempting to influence the contract selection decision and/or the employment status of Plaintiff. These are not protected activities. In the immediate case, certain D.C. council members, including then City Council Chairman Vincent Gray and council members Jack Evans and Jim Graham engaged in direct communications with the CFO, Natwar Gandhi, regarding the immediate contract award during a period of time when there was great pressure being exerted upon Payne to cancel the lottery contract award, absent any legal or ethical foundation to do so. This pressure, which he resisted, included, in Plaintiff's view, a multitude of inappropriate attempts to influence or change the contract outcome. As a result, he increasingly became the target of multiple professional and ad hominem attacks. These included internal OCFO security probes, based on a council member's spurious allegation of criminal wrongdoing and a similarly spurious allegation of wrongdoing, on behalf of the CFO, filed through his general counsel. The OCFO's Office of Integrity and Oversight ("OIO") subsequent investigations determined each allegation to be unsubstantiated. Significant political pressure and a bid protest followed his proposed contract award and the parties in interest aggressively lobbied the D.C. Council and others to reject the lottery contract as awarded by Payne. Continued pressure culminated in Payne's demotion and six months later, his termination.

Payne does not take these respective deposition requests lightly. For reasons outlined below, Plaintiff asserts that the Mayor, in his capacity as Chairman of the City Council, and council members Evans and Graham engaged in improper communications with the CFO and their mutually aligned political interests, and that these communications, which likely influenced Payne's professional demise and ultimate termination, are relevant to his wrongful termination

and whistle blower retaliation claims. In this connection, Payne directs this court's attention to a four (4) month period beginning April 2008 through July 2008, when the CFO demoted Payne. During this period, Payne complained to OIO on numerous occasions about mounting pressure to modify the awarded lottery contract award and questionable procurement practices. Interestingly, there were several different non-legislative meetings at which two different city council members were in attendance, as well as Payne's up line supervisors, Defendant Gandhi and Angell Jacobs ("Jacobs"), in which the lottery contract award was discussed. Also, there were two (2) investigations initiated by the OIO against Payne, despite the fact that Payne had filed a complaint pertinent to the OIO prior thereto. The first spurious complaint was initiated by OCFO General Counsel, David Tseng. The second spurious complaint was initiated by council member Jim Graham and involved potential criminal charges. Neither was sustained. In April and May 2008, after Payne filed his OIO complaint, and after refusing to modify, cancel or alter the lottery contract award, he suddenly went from saint to sinner. Payne communicated his concerns regarding lottery contract integrity to the D.C. Office of Inspector General's ("OIG") audit and criminal divisions, Debra Nichols, D.C. Auditor, Peter Nickles, Attorney General for D.C. and former Executive Office of the Mayor's General Counsel, Andrew Richardson. He even discussed his concern with his District Suspension and Debarment panel peer, David Gragan, Chief Procurement Officer for the District of Columbia. The CFO subsequently determined that Payne should be removed. He wrongfully demoted Payne in July 2008 and wrongfully fired him in January 2009.

FACTUAL BACKGROUND AND PROFFER

On April 9, 2008, Plaintiff met with the Office of Budget and Planning ("OBP"), which is a subordinate agency of the Office of the Chief Financial Officer, regarding several OCFO

Information Technology ("IT") contracts. During the course of this meeting, an egregious instance of contractor fraud was brought to Payne's and his supervisor's (Paul Lundquist) attention. From the information provided, Plaintiff suspected "ghost pay rolling" and overbilling. Following the meeting, Plaintiff reported his concerns the next day to the Office of Integrity and Oversight ("OIO"), the OCFO's internal security arm. Payne was gravely concerned about the OCFO's failure to comply with applicable procurement rules and regulations. Further, he suspected serious procurement fraud or waste. Payne was mindful of his affirmative duty, per the OCFO's employee conduct requirements, "to report employee misconduct and/or suspicious activity," as delineated in the OCFO Employee Code of Conduct. Following the Harriet Walters debacle, where at least fifty million dollars ($50,000,000) of District funds was stolen, and the Geneva Capital Investment losses of nearly twenty million dollars ($20,000,000), all OCFO employees, particularly those with authority over the expenditure of public funds, became increasingly watchful of irregular activities. It is important to note that this was Payne's first ever referral or request to OIO to initiate any type of investigation of an employee during his tenure within the OCFO. Apparently, this began a series of collaborative and retaliatory actions against Payne, designed to humiliate, intimidate, harass and discredit him. It is noteworthy that his performance and integrity at this time were beyond reproach.

On or about May 15, 2008, then new OIO Director Bob Andary ("Andary") met with Defendant Gandhi and reported to him Plaintiff's supposedly confidential complaint. He thereby illegally disclosed the identity of Plaintiff as the complainant, and the identity of Mike Teller, as the potential target of an OIO investigation. As a result, on that same afternoon, the CFO, Gandhi, met with Plaintiff's immediate supervisor, Paul Lundquist and his supervisor,

Angell Jacobs, and stated that Plaintiff's tenure with the OCFO needed to end "as soon as practicable." Lundquist and Jacobs met with Payne shortly after that meeting and stated that the CFO wanted him to leave the employ of the OCFO. After Plaintiff filed his complaint with the OIO, the CFO's General Counsel, David Tseng, filed a complaint with OIO against Payne. The OIO investigating agent, who was also responsible for investigating Payne's previous IT concerns, stated to him that the CFO's complaint was a "high priority investigation." Andary subsequently determined that Tseng's complaint was unsubstantiated. Plaintiff's initial OIO complaint, however, had yet to be adequately investigated. To Plaintiff's knowledge, it remains uninvestigated and unresolved.[1]

In May 2008, Plaintiff informed Lundquist, in confidence, that he intended to report his procurement concerns to the D.C. Office of Inspector General ("OIG"). Lundquist agreed that going to OIG "needed to be done for the long-term good of the OCFO," and that no one else in the OCFO needed to be informed of this action, including the CFO or other senior staff. Accordingly, Plaintiff reported to the OIG's audit and criminal investigative representatives his knowledge or suspicion of certain fraudulent procurement activities and the pressure that the CFO and others were applying to him relative to the D.C. Lottery contract. The OIG opened parallel track reviews of the OCFO and relevant procurement activities. The first track was an audit – "[t]he objectives of the audit are to determine the efficiency and effectiveness of contracting and procurement operations at the OCFO and to assess the effectiveness of internal controls and adherence to applicable laws and regulations." The second track was a fraud/undue

[1] Payne also discussed his concerns with other senior District officials, including, but not limited to the City Administrator – Neil Albert, the Attorney General – Peter Nickles, the Mayor's General Counsel – Andrew Richardson, the Chief Procurement Officer – David Gragan and City Auditor – Debra Nichols. It was Payne's belief that these disclosures would allow for the investigative review process to be objective, transparent and mitigate the potential for retaliation against Payne for making these disclosures, particularly to the extent that they involved the Chairman of the City Council and other senior elected and appointed officials.

influence review that was assigned to Special Agent Johnnie Bright, a former Federal Bureau of Investigations ("FBI") Supervisor and retired Special Agent. While at the FBI, Agent Bright later recounted to Payne, that she herself had reported inappropriate behaviors and practices and "would not allow these incidents to be swept under the rug." Shortly after Plaintiff's complaint and discussion with OIG, Plaintiff learned from others within the OCFO, most notably Chief of Staff, Lucille Dickinson, and Director of Operations, Angell Jacobs, that persons within his OCFO chain of command were aware of his presumably confidential request for an OIG investigation. From this point forward, Plaintiff's relationship with the CFO, Chief of Staff, Director of Operations and Lundquist suffered an adverse and dramatic change.

Also, commencing in April 2008 and continuing through May 2008, Payne was compelled to attend and participate in several highly unusual meetings in which the CFO, certain city council members, and Payne's supervisors convened to specifically discuss the proposed lottery contract and Warren Williams Jr's involvement. In none of these meetings was Payne asked about the technical proficiency, offering or price of the proposed lottery contract. Instead, he was repeatedly asked about Warren Williams Jr. and/or Banneker Ventures, their other business dealings with the District and how Warren Williams Jr. could be removed from the proposed contract and replaced with another "acceptable" partner. When Payne pointed out the illegality of forcibly removing a joint venturer and replacing him with another after the bid proposal, review and award process had been completed, he was repeatedly urged to re-bid the contract. [2] The first such meeting occurred on April 8, 2008 with Councilman Jack Evans

[2] At that time, rebid was a fallacy. Intralot, W2I's partner, had indicated that it would not participate in a second procurement cycle, especially due to the unethical political machinations impacting the first lottery procurement. Since there were only three (3) potential offerors in North America (Intralot, Gtech, Canadian Bank Note and Scientific Games), and only two of these had bid the first time. The withdrawal of the successful offeror (Intralot) made a rebid tantamount to a single bidder award. In other words, a non-competitive or sole source award.

("Evans"), Chairman of the Finance and Revenue Committee, which has oversight authority over the OCFO. At this meeting, held with Evans, Gandhi, Jay Young (the acting Lottery Director), Jeff Coudriet (Evans' aide), David Tseng (OCFO's General Counsel), and Payne, Evans stated that "everyone loves Intralot, their technology and the price. It's Warren Williams that people have a problem with." There was no discussion about the technical solution offered by Intralot or its price. Instead, it was about political support on the Council for the contract and the looming showdown between then D.C. Chairman Vincent Gray and then Mayor Adrian Fenty. Evans went on to expressly ask: "[c]an't we just get rid of Williams, who apparently is a slumlord who everyone has a problem with, and replace him with Manning?" Young and Plaintiff stated that it was "legally impermissible to get rid of Williams," to which Evans retorted "why not?" and to which Gandhi said, "yeah, why not?" Payne and Young then reiterated that they could not ethically or legally force Intralot to select another partner and that their duties and obligation were limited to issuing a Request for Proposals, evaluating received proposals, and making a recommendation for proposed contract award. In discharging its legislative duties and oversight role, the council should simply approve or disapprove the contract. The meeting concluded with Evans stating that "W2I will have to carry their own water on this contract." Payne, despite intense pressure, refused to perform an illegal act.

During an April 9, 2008 Council of the Whole Budget hearing, council member Graham urged the CFO to withdraw the contract and fully address questions raised during the Council Roundtable held on April 7, 2008. Council member Evans then said that he had encouraged Mayor Adrian Fenty to withdraw the contract and that Mayor Fenty had agreed. Thereafter, Payne had a brief, informal discussion with Chairman Gray. Following Payne's discussion with Gray, Payne along with another OCFO employee, approached Council member Graham in order

to determine specific concerns about W2I or the proposed contract. Rather than mentioning any concerns, Graham insisted that Payne call Dottie Love Wade and gave him a number for her. This call became the basis for Graham's subsequent complaint against Payne to Gandhi and OIO. The complaint was found to be spurious and unsubstantiated.

On April 18, 2008, Payne received an email from Angell Jacobs requesting talking points for Gandhi on the Lottery contract and alluding to an issue raised by council member Graham. Previously, when council member Graham suggested that Payne contact Dottie Love Wade, Payne phoned her and was told that she had served in the D.C. Lottery previously. She was familiar with Warren Williams Sr. and said that she had nothing to say about either him or his character. Instead, she raised vague concerns about "his ability to handle the online gaming contract, since (Williams) Sr. only previously handled the Instant Tickets contract." Following this call, W2I, the primary contractor, complained to Payne that Dottie Love Wade had offered council member Graham's support if she received a "stay at home" job, a car and other perks, which W2I reportedly declined. Payne cautioned W2I against engaging in any discussions that might be construed as improper or constituting a *quid pro quo*. He then encouraged W21 to report their concerns and disclose the alleged request to OIO as well. Payne subsequently met with council member Graham, his then aide, Ted Loza, along with Cynthia Gross, an OCFO staffer. In that meeting, Graham, referring to Payne, said: "I have a bone to pick with you." Instead of telling him what it was, he said*: "I've discussed it with Gandhi and he'll discuss it with you. Just know that I'm not happy."* (Emphasis added) Council member Graham did not raise a single question about the procurement process, the technical proposal of W2I, the price offered by W2I or ability of W2I to meet the contract requirements. This discussion appeared to be driven by concerns outside of the legislative process and directly related to Payne's personnel

status and his refusal to compromise the integrity of the contracting process.

Payne's final meeting was with Council Chairman Gray, Gandhi and others on May 5, 2008. It was then Plaintiff's belief that any meeting with a council member and the CFO to discuss modification or cancellation of the contract award was inappropriate and constituted efforts to unduly influence the contract selection process. Previous meetings had veered far afield from the typical contract selection and Council review process. At that meeting, Gray stated that he would not permit the lottery contract to be placed on the Council's legislative agenda prior to expiration in May 2008. Gray asked no questions about any aspect W21's technical or price proposals and raised no substantive concerns. Immediately after the meeting, Gray asked Gandhi to remain behind. They met privately as Payne and other staff waited in Gandhi's office. After the private meeting, Defendant Gandhi summoned Plaintiff into a meeting with Jacobs and other staff and repeatedly cajoled Payne to cancel the proposed lottery contract and reopen the process. Plaintiff resisted and advised the CFO that there was no legal basis upon which to do so and that the contract's cancellation was legally impermissible. Apparently, the CFO was being pressured to end the contract award and to demote and/or terminate Plaintiff in order to remove his aggressive insistence on following objective, impartial and legal contract procurement procedures. Notably, by this time, Plaintiff had filed at least two complaints involving the CFO, one in OIO and the other in OIG.

Several weeks later, on or around June 12, 2008, Plaintiff met with Bob Andary, the OIO Director. Andary disclosed to Payne a meeting that he had with Gandhi in mid-May 2008 at which time he disclosed to him Payne's reported concerns. It was then that Payne fully realized that OIO's independence and integrity had been compromised relative to possible contractual improprieties. Immediately following the June 12th meeting, Gandhi emailed Lundquist and

Jacobs and requested a meeting to discuss procurement. Following that meeting, Lundquist told Payne that the CFO decided that Payne's tenure with the OCFO should end. Payne was also told that he had until the end of the fiscal year to find alternative employment. On June 27, 2008, Plaintiff had a second meeting with Andary regarding council member Jim Graham's complaint against Payne. This investigation concerned Dottie Love Wade.

On July 1, 2008, Lundquist informed Payne that he was being removed as the Director of the Office of Contracts and would undergo a title change. This decision, according to Lundquist, was the "will of Gandhi." Payne was told that "he would remain the public face of the lottery contract" and that a new role, title and duties would be discussed in a subsequent meeting. . On July 7, 2008. Jacobs and Lundquist met with Payne to explain and effectuate his demotion. The following exchange from that meeting is instructive:

> **Eric Payne:** "W2I folks called me after they met with both Graham and Gray, because, during the course of the meeting with Graham and Gray, they were told directly by those council members that Gandhi assured them that I would not be in this position much longer and that the contract would go away and it would be re-bid…."
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> **Angell Jacobs:** "…[T]hat is not true. Not that they didn't say that. (Nervous laughter). I don't know what they said, but I do not believe that Dr. Gandhi, for one minute, told a council member that you would not be there. I believe that Graham does not want you to be there, because I believe that that would give him some credibility about his personal issues with the contractors. But I do not believe, and I can't tell you how strongly I don't believe that Dr. Gandhi ever had a conversation to that affect (inaudible) with anybody on the Council. But let me say this, part of what (inaudible) … online gaming (inaudible) part of this is we have lost control of the reins of this chariot that we're on, because, ummm, you know, if we had our druthers, I think Dr. Gandhi would say "that dog don't hunt" and we should start the procurement process again. (Inaudible) Not to be shared outside this room. The mayor's office has decided that they are going to use this issue to make the council look like crap. Ok? Because of that, the decision was made upstairs, not in discussion with us, but basically was told to us, that they're going to withdraw the contract and resubmit it and force the Council to vote, or at least make them look really bad, once again, for not voting. So, our position is yes, we support the vendor that we sent up. Yes, we think that that's the best technical solution. Yes, we think that it will save the District money, and, if we have to, if this vendor does not get to take place, we will do an analysis to see whether or not there will be an effect on revenue. And we will issue a letter to that effect if that is the outcome of our analysis. But, it puts us in a precarious position between the Mayor and the Council on this issue. But, so…

> so… yes, we support it, but are we going to lobby for it? No, because we've let the politicals take that challenge and that's what they're doing. Umm, so we'll see. Do we have any concern at all about the process that we used? No. Do we have any concern at all about what you've did? Or the things that your office has done? Or any of the [OCFO] participants? Absolutely not. And that's why I said to you, Jim Graham is on a personal vendetta here and, you know, he thinks the way to get what he wants is to find a way to discredit the people that were involved in the process. And he doesn't care who that involves. Umm, because for Gray and Graham, this is all personal. This is about their friends, or who is not their friends for Graham…"
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> **Tape counter:** 41:46 to 44:52

Lundquist further advised Plaintiff that he had the freedom to "look for another job" but henceforth, all staff would report to Joe Giddis, the recently hired Deputy Director for the Office of Contracts. Lundquist further informed Plaintiff of his new title, "Senior Advisor," internally only. Externally, Plaintiff would remain the Contracting Officer for the online gaming procurement. Despite being stripped of his role and authority, Plaintiff remained the public face and target for proponents of LTE's contract and opponents of W2I. Thereafter, he was removed from his large Director's Office and assigned to the small space normally used by interns or as a storage area. In October 2008, following Plaintiff's attempts to negotiate resolution (i.e. payment) of liquidated damages assessed to LTE, the CFO's General Counsel directed Payne to cease all direct contact and communications with LTE. He further informed Payne that all communications would flow through him. In October 2008, the Contract Appeals Board ("CAB") rejected LTE's bid protest and upheld Payne's contract award. The CAB determined that the procurement process was fair, reasonable and objective. Despite an independent review by the CAB and denial of the bid protest, the D.C. Council rejected the proposed contract in mid-December 2008.

On January 8, 2009, Plaintiff received an email request to meet with Lundquist on January 9, 2009 to discuss his performance evaluation for FY 2008, which ended on September

30, 2008. Ordinarily, Payne would have received this performance evaluation sometime between October 1, 2008 and November 30, 2008. Payne's numeric score was a 3.89/5.0, which "Exceeds Expectations." During that January 9th meeting, Plaintiff was told that his services were no longer needed and that he was terminated, effective immediately. No reason was given. He was given a week to consider a settlement package. The Human Resources ("HR") Director, joined by two (2) armed security guards, the Deputy HR Director, Deputy Logistics Director, Lundquist and his assistant, stood prominently and publicly in Payne's small office, supervised his removal and intentionally humiliated him. The entire office observed this unnecessary and vengeful act of public humiliation.

Finally, Defendants achieved their ultimate objective, Payne's demise and the removal of any impediment to the ensuing rebid of the lottery contract.

ARGUMENT

I. Neither the activities of Mayor Vincent Gray, Jim Graham nor Jack Evans are protected by Legislative Immunity

Former D.C. City Council Chairman, now Mayor Vincent Gray, and council members Graham and Evans have moved to quash Plaintiff's subpoenas on the grounds that their depositions would be unduly burdensome and/or barred by "absolute immunity" pursuant to the District's "Speech or Debate" statute. D.C. Code Ann. § 1– 301.42 (2011). That statute provides that "[f]or any speech or debate made in the course of their legislative duties, the members of the Council shall not be questioned in any other place." *Id.* "Legislative duties" is defined as follows: "The responsibilities of each member of the Council in the exercise of such member's functions as a legislative representative, including but not limited to: Everything said, written or done during legislative sessions, meetings, or investigations of the Council or any committee of the Council, and everything said, written, or done in the process of drafting and

publishing legislation and legislative reports." D.C. Official Code § 1-301.41(b). The legislative history and the case law interpreting this statute make clear that it is modeled on the Speech or Debate Clause of the United States Constitution, and that the statute was intended to be interpreted liberally, so as to protect "'genuine legislative functions ... which are exercised beyond the mere confines of the Council Chambers or a committee meeting place.' " *Gross v. Winter*, 876 F.2d 165, 174 (D.C. Cir.1989) (quoting Report on Bill No. 1–34, "Legislative Privilege Act of 1975," Comm. on the Judiciary & Criminal Law Council of the District of Columbia 1 (Dec. 4, 1975)).

The Supreme Court has long held that this Clause protects acts that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606 at 625, 92 S.Ct. 2614 (1972). The Clause provides further protection in precluding "inquiry ... into the motivation for" acts "that occur in the regular course of the legislative process." *United States v. Helstoski*, 442 U.S. 477 at 489, 99 S.Ct. 2432 (1979) (quoting *United States v. Brewster*, 408 U.S. 501 at 525, 92 S.Ct. 2531 (1972)); *accord United States v. Johnson*, 383 U.S. 169 at 180, 86 S. Ct. 749 (1966). In defining categories of protected conduct, the United States Supreme Court has been careful not "to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." *Brewster*, 408 U.S. at 516. The Speech or Debate Clause, therefore, "does not prohibit inquiry into illegal conduct simply because it has *some nexus* to legislative functions," *Id.* at 528 (emphasis added), or because it is merely "related to," as opposed to "part of," the "due functioning" of the "legislative process," *Id.* at 514. (emphasis

removed).

It follows, therefore, that elected officials cannot lawfully interfere with executive branch personnel decisions by way of threatening or causing an adverse personnel action against an employee involved in the programmatic aspect of affected legislation. This is oxymoronic to the fabric of our democracy and its inherent checks and balances. Ostensibly, personnel actions, such as those which led to the whistleblower retaliation and wrongful termination claims here, have no nexus whatsoever to any legislative function, and can never be "an integral part of the deliberative and communicative processes" in which Council members engage as legislators. *Brewster*, 408 U.S. at 528; *see id.* at 513-16. To the extent that legislators are directly or indirectly involved in pressuring an employee to illegally rebid a lottery contract, and orchestrating the illegal demotion and/or removal of personal or committee staff personnel, as they did in the instant case, such acts do not qualify as legislative functions. The legislative process at the least includes: delivering an opinion; making a speech;, engaging in debate; proposing legislation; voting on legislation;, making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas pertinent to certain legislative issues; holding hearings; and developing a legislative record at Committee hearings."

Courts have determined that many personnel decisions by Congressional members' personal offices lack even "some nexus" to legislative acts. *Id*. at 528. For example, firing an aide for falsifying expense reports, or disciplining an assistant for harassing others in the office is "not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator." *Id.* at 526. To be protected by the Speech or Debate Clause, a legislator's personnel decision must be part of due functioning of the legislative process; that the person targeted by the personnel decision performs duties directly related to the legislative process is not

enough; abrogating *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (1986). U.S. Const. Art. 1, § 6, cl. 1. In the immediate instance, Payne's anticipated inquiry of the subpoenaed elected officials is driven by several considerations: 1) his wrongful termination as a result of refusing to commit an illegal act or to violate public procurement policy, to wit, modify, alter or cancel an awarded contract for political reasons; 2) that he was retaliated against as a result of his complaints to investigative authorities in the OCFO and elsewhere; 3) Jack Evans' direct communication with the CFO and Payne regarding changing the contract award and other communications related thereto; 4) Jim Graham's instigation of an OCFO Office of Integrity and Oversight complaint and inquiry against Payne, communications with the CFO regarding Payne (corroborated by Angell Jacobs July 7, 2008 statement regarding Graham and Gray) and communications related thereto; and 5) Gray's resistance to the awarded contract, meeting with the OCFO staff regarding the contract, his subsequent private conversation with Gray, and communications with the CFO and others about Payne. During the above referenced four (4) month period, Payne became an object of concerted internal and external scrutiny and attack. To this extent, the subpoenaed witnesses can testify about specific communications outside the legislative sphere to OCFO staff, including the CFO, regarding modification or cancellation of the contract and about Eric Payne.

To the extent that this is a close issue for the court, the proverbial evidentiary straw that should break the camel's back is the July 7, 2008 meeting between Payne, Jacobs and Lundquist. Jacobs specifically mentioned Gray and Graham's names in the context of effectuating Payne's demotion, to wit, that for Gray and Graham the matter was "personal." Spiteful personal actions are not protected by legislative immunity. Upon information and belief, these individuals influenced Payne's personnel status, including his ostracization, demotion and termination. For

this reason, their actions do not merit the protection of legislative immunity.

Unlike each supporting authority cited by Movants including *Williams v. Johnson*, 597 F. Supp. 2d. 107, 112 (D.D.C. 2009), the protected legislative conduct here does not include: (a) conducting a hearing; (b) questioning witnesses and making statements at the hearing; (c) meeting with Plaintiff to discuss a matter that was raised at a hearing and to receive information concerning alleged wrongdoing at an agency that is under the Councilmember's oversight responsibility; or (d) launching an investigation as a result of the information received. The movants cannot find a case factually on point in which legislators attempt to cancel or modify an existing contract and adversely affect an employee's employment, and are thereafter barred from giving testimony on the basis of legislative immunity.

The movants also suggest that Plaintiff's subpoenas are tantamount to a "fishing expedition." Plaintiff can assure this Court that a fishing expedition this is not. As demonstrated above, there is considerable evidence and anticipated testimony which will corroborate Plaintiff's efforts. Notably, the Plaintiff has attached an affidavit which bolsters his argument. The CFO's deposition is scheduled for September 19, 2011. However, the deposition of high government officials should not preclude pursuit of credibility and truth by exclusion of other key elected officials who may have influenced their decisions and further, played a role in the claims from which this pleading emanates.

In sum, the critical questions before the court are simple: Whether the action at issue was undertaken within the legislative sphere? For reasons stated, this court should answer no. To the extent that the answer is no, the question is the extent to which the mayor and two council members communicated with the CFO and any OCFO staff regarding the cancellation and modification of the awarded lottery contract and discussed Eric Payne and his professional

status. The Court should permit the depositions so that these questions can be answered appropriately.

II. Extraordinary Circumstances obviate any Burden on Mayor Gray

Defendant asserts that Mayor Gray, absent extraordinary circumstances, should not be ordered to be deposed. Notably, Mr. Gray is not being deposed in his capacity as Mayor, but as the former Chairman of the City Council, similarly to council members Graham and Evans and on an issue of major public importance to this community. At the outset, Plaintiff has demonstrated that Mr. Gray may have enjoyed a greater involvement in this issue than acknowledged by Defendant.

Indeed, the circumstances here are extraordinary. Woven beneath the spider web of political animosity between the City Council and former Mayor Fenty was an inter-play between then city council members and the CFO related to an awarded lottery contract. The only barrier to the political versus legal selection of the lottery contract award was Eric Payne and his insistence that the decision be consistent with the letter of the law. The primary communications at issue involve communications between the Mayor in his capacity as former Council Chairman and the CFO and other council members, in particular Messrs. Evans and Graham. Only these individuals can testify as to what was stated between them relative to Payne. Further, the issue at hand is fundamental to government ethics and procurement integrity. Indeed, this argument, as presented by the Mayor is weak and unsupported by legal authority. As to use of the Mayor's time and any burden related thereto, given the backdrop of this case the Mayor's deposition would greatly advancing the public's interest and knowing his role, if any, in Payne's professional demise.

CONCLUSION

Elected D.C. officials can only approve or disapprove of proposed contracts for a given reason or none at all. It is an affront to the fundamental notions of fairness and objectivity, however, to allow political considerations to taint contract awards and/or personnel decisions. It is also a violation of the separation of powers for council members to influence the wrongful demotion and firing of executive branch staff. The lottery contract award here was a major contract involving both the legislative and executive branches of local government. Heretofore, D.C. investigative government units have failed to properly explore the detailed allegations of Plaintiff. This Court remains the last venue in which truth and justice may be served. For reasons stated herein, the respective motions for protective orders should be denied and the court should require the elected official witnesses to present forthwith for the requested depositions.

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that the following participants in the case as of this 15th day of September, 2011 are registered CM/ECF users and that they will be notified electronically through the CM/ECF system:

Sarah L. Knapp sarah.knapp@dc.gov
Reid Whitten rwhitten@fulbright.com

I also certify that on this 15th day of September, 2011 the foregoing was served via First class mail upon:

V. David Zvenyach, General Counsel
John Hoellen, Deputy General Counsel
Council of the District of Columbia
1350 Pennsylvania Ave. NW, Suite 4
Washington, D.C. 20004

_____/s/_____
Donald M. Temple, Esq.

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